FILED
DEC 28 1955
HAROLD B. WILLEY, C

Supreme Court of the United States

OCTOBER TERM 1955

No. 474

WINSTON M. REYNOLDS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

ZACH H. DOUGLAS,
Lynch Building,
Jacksonville, Florida;

WILLIAM W. JUDGE,
121 Broadway,
Daytona Beach, Florida;

FRANK S. TWITTY,
Camilla, Georgia

CLYDE W. ATKINSON,
Centennial Building,
Tallahassee,

CHARLES R. ADAMS, JR.,
Camilla, Georgia.

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To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

WINSTON M. REYNOLDS, Petitioner, respectfully petitions this Honorable Court for a rehearing of the Order of the Supreme Court of the United States entered December 5, 1955, denying his petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and most respectfully says:

This Honorable Court, in and by its Order denying certiorari, we are respectfully inclined to believe, inadvertently overlooked plain errors and defects, apparent on the record

and implicit in and permeating the entire oral charge to the jury, directly affecting and prejudicing substantial rights of Petitioner as demanded by settled procedural standards for administration of criminal justice in Federal Courts, under Rule 52 (b), Federal Rules of Criminal Proceedure, in this, to-wit:

1. In this case it stands conceded that the crime charged in the indictment is an attempt to evade and defeat wagering excise taxes, the gravamen of which felony is an intent to wilfully and positively attempt to evade the tax in any manner or to defeat it by any means (Sec. 2707, Title 26, U. S. C.). The same statute also proscribes willful omissions to pay the tax as misdemeanors. This Honorable Court has construed the statute here involved, in its decision in Spies v. United States, 317 U. S. 492, 87 L. Ed. 418, and settled the law to be that in prosecutions for the felony some wilful commission in addition to the wilful omissions making up the misdemeanors is necessary to lift the offense to the degree of the felony, and that the accused in the felony prosecution is entitled to a charge to the jury which will point out the necessity for the inference of willful attempt to defeat or evade the tax from some proof in the case other than that necessary to make out the misdemeanors. The law, thus settled by decision of this Honorable Court, grants Petitioner the substantial right to such an instruction upon this the most vital element of the charge laid in the indictment, and this right was denied to Petitioner and he was thereby prejudiced by the failure of the trial Judge to give the jury such an instruction in its oral charge. The procedural standards traditionally fixed by this

Honorable Court for the administration of criminal justice in the Federal Courts impose a duty upon trial Judges to charge the jury on all essential questions of law, whether requested or not, and the Rules promulgated by this Honorable Court for the government of criminal procedure in the Federal Courts unequivocally demand that the plain error and defect contained in the oral charge to the jury occuring in this case shall be noticed although it was not brought to the attention of the trial Judge.

Sec. 2707, Title 26, U. S. C.;

Salinger v. United States, 23 Fed. (2d) 48, C. A. 8, 1927;

Samuel v. United States, 169 Fed. (2d) 787, C. A. 9, 1948;

Spies v. United States, 317 U. S. 492, 87 L. Ed. 418;

Barron's Fed. Prac. & Proc., Rules Ed., Vol. 4, Sec. 2232, page 241;

Bollenbach v. United States, 66 S. Ct. 402, 326 U.S. 607, 90 L. Ed. 350;

Rule 52 (b), Federal Rules of Criminal Procedure.

2. Flagrant violence to Petitioner's fundamental right to a fair trial affirmatively appears in the oral charge to the jury as a whole, when the trial Judge at the conclusion of his oral instructions, complicated and confused the whole of his instructions theretofore given to the jury and, in essence and effect, mandatorially limited the issues to be decided by the jury to a subordinate element of the offense charged and

withdrew from their consideration the indispensably vital issue of willful intent to evade and defeat payment of the tax, when he instructed the jury as follows:

> "While I have spent too much time talking about this case and in some respects repeating myself, I trust that I have aided you instead of confusing your minds as to the problems you have to consider. When you look through the law and understand it and see what the question is that you have to determine here, then you'll realize that your question is a fairly simple one. You don't have to be bothered with the complicated tax requirement the law requires as to the tax, the payment, whether or not it was paid or its amount or any of those things. All you've got to decide is whether or not this defendant as charged in this indictment is the banker they've been calling in this case in a lottery operation conducted at Beachwood Farms. That's all you have to decide. You don't have to decide whether or not he has filed his return satisfactorily or any of those other things.
>
> "If this evidence shows that he was, in fact, engaged in the operation of a lottery for profit, then your verdict in this case will have to be that of guilty. If the government has failed to show that then the defendant is entitled, at your hands, to a verdict of not guilty."
>
> (Underscoring supplied)
>
> **Record, Page 714**

3. On page 9 of the printed Petition for Writ of Certiorari filed in this Court, there appears this statement:

"A Motion for Change of Venue was denied but is no longer urged as error since there is no report of the examination of jurors on their voir dire."

Counsel, after reading and analyzing Shepard v. State of Florida, 341 U. S. 50, feel that they might have deprived their

client of the benefit of reversible error in this case by not urging a review of the Motion for Change of Venue and all of the exhibits filed in support thereof, the same being newspaper clippings, radio broadcasts and certificates of the District Court Clerk certifying that all of the trial jurors resided in the Judicial Division where the conviction was had and nine of the twelve jurors resided in Tallahassee, Florida, where the case was tried.

In order to preserve Petitioner's constitutional right to a fair and impartial trial and due process of law, it may be that the Court would consider the Motion for Change of Venue denied by the District Court as parallel to and on all fours with the Shepard case cited, even though the point of law has not been urged in Petitioner's pleadings.

We realize that this is our client's last opportunity to be heard in this Court and submit this matter in response to the duty resting upon counsel.

See page 17 of Volume 1, Transcript of Record and exhibits filed with Petition for Rehearing in Court of Appeals for reference to Motion for Change of Venue.

Respectfully submitted:

ZACH H. DOUGLAS,
Lynch Building,
Jacksonville, Florida;
WILLIAM W. JUDGE,
121 Broadway,
Daytona Beach, Florida;
FRANK S. TWITTY,
Camilla, Georgia;
CLYDE W. ATKINSON,
Centennial Building,
Tallahassee, Florida;
CHARLES R. ADAMS, JR.
Camilla, Goergia.

I hereby certify that the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari is presented in good faith and not for delay, and I also hereby certify that said Petition for Rehearing is restricted to substantial grounds available to Petitioner, although not previously presented.

ZACH H. DOUGLAS,
Lynch Building,
Jacksonville, Florida.

PROOF OF SERVICE

I hereby certify that I have made service of 3 copies of the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari upon the Solicitor General, Department of Justice, Washington 25, D. C. by depositing same in an envelope so addressed and placing the same in the United States Post Office at Jacksonville, Florida, on the ------ day of December, 1955, with sufficient postage to insure delivery.

ZACH H. DOUGLAS,
Lynch Building,
Jacksonville, Florida.

I further certify that I have also mailed, in due course of mail, a copy of the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari to Honorable Harrold Carswell, United States Attorney, Northern District of Florida, Tallahassee, Florida, and a copy to the Honorable Hayford O. Enwall, Assistant United States Attorney, Tallahassee, Florida, on this the ------ day of December, 1955, with postage thereon fully prepaid.

Attorney for Petitioner

Ford